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417-300—71——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1166

EARLE T. COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1–B32) is reported at 432 F. 2d 1093.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1970 (Pet. App. A). A petition for rehearing was denied on November 25, 1970. The petition for a writ of certiorari was filed on December 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a vise was properly seized under a search warrant authorizing seizure of instrumentalities used in preparing an explosive device.

2. Whether, in ruling on a pretrial motion to inspect, the trial court may defer inspection of reports of F.B.I. scientific tests of the remains of an explosive device until after the defense has inspected the physical evidence upon which the tests were made.

3. Whether petitioner was denied effective assistance of counsel.

4. Whether there was a proper voir dire examination of prospective jurors.

5. Whether the court of appeals properly refused to remand the case for a hearing to determine if the case was tainted by electronic surveillance.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted under a two count indictment charging him with placing a destructive device on, and causing damage to, an airplane, in violation of 18 U.S.C. 32. He was sentenced to twenty years on each count, the sentences to run concurrently. The court of appeals affirmed.

The sufficiency of the evidence, which is not disputed, was summarized by the court below in part as follows (Pet. App. B2):

> Beginning some four years prior to the incident directly involved, Cook, who had some history of marital discord, made approaches to

individuals to attempt to make arrangements for his wife to be killed. On some of these occasions, there was discussion of the development of a device to set off explosives. On November 12, 1967, Cook drove his wife to the airport where she was taking a plane to California. He first checked two bags for his wife with a skycap, receiving two stubs therefor. Cook then returned to his car and took out a third bag and checked it through another skycap. He then gave the stubs for two of the bags to his wife but did not give her the stub to the third bag in which a bomb was secreted. There were some 81 persons on the 727 jet plane. Some place over Colorado a bomb exploded in the baggage compartment depressurizing the aircraft, which was nevertheless able to proceed to San Diego without further mishap.

ARGUMENT

1. Several days after the explosion, the F.B.I. obtained a warrant to search petitioner's home. The six-page affidavit,[1] filed in support of the application for the warrant, recited facts about the airplane explosion and petitioner's prior efforts to kill his wife, including his statement that he "knew how to rig a time bomb with a clock and dynamite and had experience with such an explosive device." The warrant authorized seizure of items similar to the components of the bomb found on the plane and of "other instrumentalities which are designed and intended for use and which have been used as a means of committing

[1] The affidavit is on file with the Clerk.

offenses" in violation of the statutes pertaining to placing destructive devices on airplanes. The initial contention here is that a vise, whose markings were present on the bell of an alarm clock found in the post-explosion debris, was improperly seized under the warrant.

The object of the warrant, as the court below noted, was to seize the "component parts of explosive devices and the instrumentalities used in preparing such devices" (Pet. App. B22). The items which could be described—those similar to the components of the bomb found in the plane—were specified in the warrant. The agents could not know with certainty, however, the particular tools used in making the bomb. The phrase, "instrumentalities used in preparing" explosive devices, was sufficient to identify them for purposes of the warrant. See *James* v. *United States*, 416 F. 2d 467, 473 (C.A. 5), certiorari denied, 397 U.S. 907. Cf. *Steele* v. *United States*, 267 U.S. 498, 503.[1] It is clear that a vise could reasonably be considered to be among such instrumentalities.

2. Prior to trial, the district court granted petitioner's motion for pretrial discovery of all the physical evidence which the government intended to introduce but denied, "at this time without prejudice" (Pet. App. B4), his motion to inspect the reports of tests made by government experts upon this physical evidence. At trial, the government introduced certain

[1] *Marron* v. *United States*, 275 U.S. 192, is not to the contrary. There, the warrant authorized seizure of intoxicating liquors and articles for their manufacture and did not specify the seizure of private books of account.

wires which F.B.I. agents testified were the same as or similar to wires found in petitioner's home. It also introduced the bell of the alarm clock which, testimony showed, had been marked by the vise seized from petitioner's home.

Petitioner, who did not renew his motion to inspect the reports after it was initially denied without prejudice, contends that the district court's ruling was erroneous because he had an absolute right to see the reports under Rule 16(a)(2) of the Federal Rules of Criminal Procedure. The court below, in a lengthy discussion of this issue (Pet. App. B3–B16) recognized that such inspection is generally held to be a matter of right, and stated that the trial court has "little, if any discretion" in denying such a motion. But the court also asserted, properly, that the trial court "has the power to control the chronology of discovery procedures." Since petitioner never renewed the discovery motion that had been left open in the interim ruling and did not object to the admission of evidence, the court properly held that there was no error requiring reversal.[8]

[8] The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is presently considering changing Rule 16(a)(2) to clarify whether government reports must be shown to defendants as a matter of right. The present rule provides that "[u]pon motion of a defendant the court may order" inspection of such reports. The proposal is to substitute "shall" for "may" in order to make "disclosure of the reports of examination and tests mandatory rather than discretionary with the judge" (Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for U.S. District Courts (Jan. 1970), pp. 43–58). This matter is appropriately resolved by the rule-making process.

3. In his petition for rehearing in the court below, petitioner contended he was denied effective assistance of counsel. His argument was based primarily on statements in the court of appeals' opinion with respect to trial counsel's handling of the discovery motions (Pet. App. B12). Petitioner renews this contention in this Court. Whatever were counsel's reasons for not pressing for discovery of the government's reports, however, his overall representation did not make the proceedings "a farce and a mockery of justice". See, *e.g.*, *United States* v. *Long*, 419 F. 2d 91, 94 (C.A. 5). For example, as the opinion below points out, counsel conducted effective cross-examination "directed to eliciting admissions from the scientific test witnesses that the tools and bomb fragments were mass produced, could be obtained anywhere and that crimp marks could have been made by a variety of tools, any of which were commercially available in large numbers. Cross-examination further elicited that the pieces of wire were not necessarily from a continuous coil of wire" (Pet. App. B11).

4. The claim that the voir dire examination was inadequate because the trial judge did not individually question each prospective juror, out of the presence of the others, with respect to pretrial publicity, also is answered by the opinion below (Pet. App. B22–B23). As the court points out, petitioner was afforded full opportunity to question the jurors. Moreover, available peremptory challenges were not exercised to exclude several jurors who had knowledge of the case (Pet. App. B23).

5. After the defense rested its case, counsel asked the government to disclose whether any evidence had been obtained by means of listening devices or electronic eavesdropping. The prosecutor advised "that there were no illegal eavesdropping devices" in this case (Pet. App. B31); he declined to state whether any eavesdropping equipment had been used at all (Tr. 931–941). On appeal, petitioner contended that the government should be required to disclose the existence of any electronic surveillance regardless of its view as to the legality of such surveillance. Petitioner argued that the case should be remanded for a determination of the legality of any eavesdropping. The government responded with a letter from the Criminal Division of the Department of Justice stating unequivocally that petitioner had not been the subject of direct microphone surveillance and that none of his conversations had been monitored.[4] Upon the basis of this letter, the court below declined to remand the cause, although it stated that it would have been preferable for the government to have supplied the pertinent information to the trial court. Its ruling thus is

[4] The full text of the letter is as follows:

This is in reply to your letter of October 30, 1969 requesting any electronic surveillance made on subject Cook in connection with his trial in your District.

Please be informed we have contacted the appropriate investigative agencies and have been informed Cook was *not* the subject of a direct microphone surveillance nor were any of his conversations monitored. Further, we are informed, no electronic surveillance was maintained on premises which were known to have been owned, leased, or licensed by the above individual.

correct under *Taglianetti* v. *United States*, 394 U.S. 316. Moreover, the steps taken below accord with the statutory procedures now provided with respect to claims of illegal electronic surveillance in proceedings occurring after October 15, 1970; we shall describe the new statutory procedures *infra*.

Congress has enacted two statutes that cover, in some detail, both the substantive and procedural aspects of electronic surveillance. The Omnibus Crime Control and Safe Street Acts of 1968, 82 Stat. 197, 212, now 18 U.S.C. (Supp. V) 2510–2520, established procedures for obtaining judicial warrants for electronic surveillance and for the preservation and disclosure of intercepted communications; that legislation specifically requires disclosure of the fact that oral or wire communications were intercepted under a warrant (18 U.S.C. 2518(8)(d)). Title VII of the Organized Crime Control Act of 1970, 84 Stat. 935 (set forth in the Appendix, *infra*), further provides specific rules for government disclosure with respect to all electronic surveillances; these rules apply to "all proceedings, regardless of when commenced, occurring after" October 15, 1970, the date of enactment of the 1970 Act. Under these statutory rules, the government is required to affirm or deny the existence of an illegal electronic surveillance if and only if the defendant first raises a claim that the case against him is affected by such illegal activity.

In view of the statutory rule which now places upon a defendant the express burden of raising any issue of illegal electronic surveillance, it seems appropriate to conform the government's practice with the statute. Accordingly, the government is discontinuing the practice, announced in the supplemental brief in *Schipani* v. *United States*, No. 504, O.T. 1966, of initiating its own review of the files in each case to determine whether there was such surveillance which might have affected the case.[5] Instead, the government will now conduct such a review only when a claim is raised by a defendant, as the statutory rules provide.

The new statutory rules recognize the considerable administrative burden of conducting electronic surveillance reviews of each and every case brought to trial.[6] We believe that continued assumption of that burden is unwarranted in light of the changes in circumstances since the former review practice was instituted. The policy adopted in 1965 and the warrant procedures subsequently established in 1968 have, we believe, greatly reduced in recent years the instances in which arguably illegal electronic surveillance has occurred. In this connection, we observe that in the recent cases in which the government has notified the Court of illegal electronic surveillance, the immateriality of the information obtained has been so clear that the Court has not remanded the cases for hearings on the issue of taint. See our briefs in oppo-

[5] This policy was in accord with guidelines promulgated in a memorandum from the President on June 17, 1965, prohibiting electronic surveillance in all instances except for the collection of intelligence about matters affecting national security.

[6] See H. Rep. No. 91-1549, 91st Cong., 2d Sess., p. 92.

sition in *Lazarus* v. *United States*, No. 395, O.T., 1970, certiorari denied, October 19, 1970; *Gordon* v. *United States*, No. 1340, O.T., 1969, certiorari denied, 398 U.S. 927; *Teresa* v. *United States*, No. 1200, O.T. 1969, certiorari denied, 397 U.S. 1063; and our supplemental memorandum in *Moylan* v. *United States*, No. 885, O.T., 1969, certiorari denied, 397 U.S. 910.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1971.

APPENDIX

ORGANIZED CRIME CONTROL ACT OF 1970, P.L. 91-452, 84 STAT. 922 *et seq.*

* * * * *

TITLE VII—LITIGATION CONCERNING SOURCES OF EVIDENCE

PART A—SPECIAL FINDINGS

SEC. 701. The Congress finds that claims that evidence offered in proceedings was obtained by the exploitation of unlawful acts, and is therefore inadmissible in evidence, (1) often cannot reliably be determined when such claims concern evidence of events occurring years after the allegedly unlawful act, and (2) when the allegedly unlawful act has occurred more than five years prior to the event in question, there is virtually no likelihood that the evidence offered to prove the event has been obtained by the exploitation of that allegedly unlawful act.

PART B—LITIGATION CONCERNING SOURCES OF EVIDENCE

SEC. 702. (a) Chapter 223, title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3504. Litigation concerning sources of evidence

"(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

"(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

"(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968,* or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

"(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

"(b) As used in this section 'unlawful act' means any act the [sic] use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto."

(b) The analysis of chapter 223, title 18, United States Code, is amended by adding at the end thereof the following new item:

"3504. Litigation concerning sources of evidence."

SEC. 703. This title shall apply to all proceedings, regardless of when commenced, occurring after the date of its enactment. Paragraph (3) of subsection

*June 19, 1968, was the effective date of the Omnibus Crime Control and Safe Streets Act of 1968.

(a) of section 3504, chapter 223, title 18, United States Code, shall not apply to any proceeding in which all information to be relied upon to establish inadmissibility was possessed by the party making such claim and adduced in such proceeding prior to such enactment.

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